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Supreme Court of the United States

October Term, 1942.

No. 1037

ARTHUR A. STEINER,
Petitioner,

versus

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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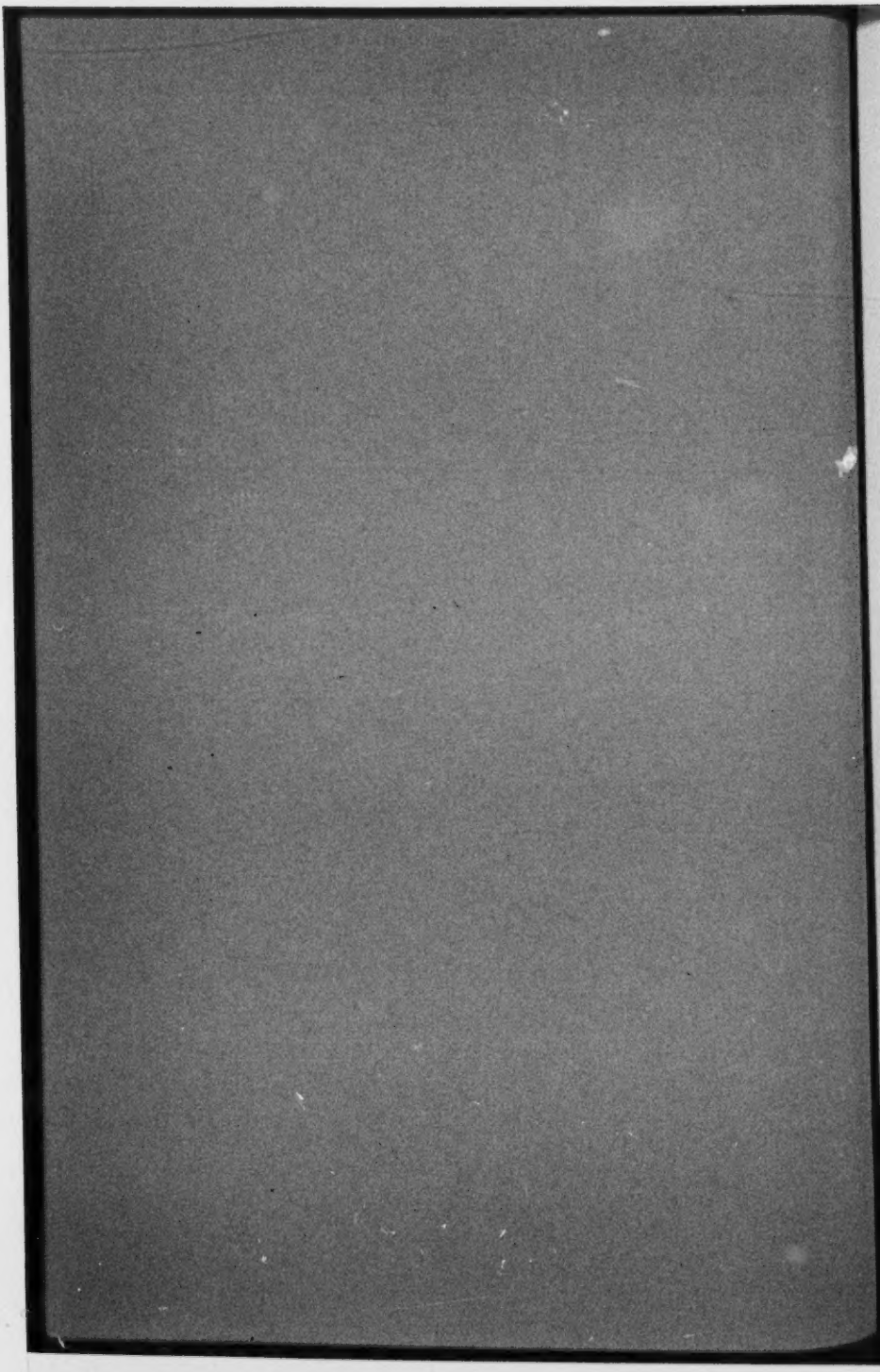

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Arthur A. Steiner, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered in the aforesaid entitled cause on March 29, 1943, (R. 1460), rehearing denied April 24, 1943, (R. 1474), affirming the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Divi-

sion, entered on June 24, 1942, (R. 53, 54) which sentenced the petitioner upon a verdict returned by a jury on June 19, 1942, (R. 48).

SUMMARY.

The indictment (R. 3), in six counts, differing only in the "mailings" specified, charged the petitioner and two others [1] with violation of the federal mail fraud statute.[2] The defendants were jointly tried but represented by separate counsel. The District Attorney dismissed Count 3, before the end of the trial, hence no verdict was returned on that Count.[3] A verdict of guilty was returned upon the remaining five counts, (R. 48). The District Court fined the petitioner $500.00 on each count or $2500.00 in the aggregate, and one-third of the costs of prosecution, and on Counts 1 and 2 sentenced petitioner to imprisonment of seven years, and on Counts 4, 5 and 6 sentenced petitioner to an additional seven years to run consecutively with the sentence imposed as to Counts 1 and 2, but suspended the execution of the latter sentence under certain terms and conditions.

OPINION OF THE COURT BELOW.

The District Court (Caillouet, D. J.) filed no opinion. The Circuit Court of Appeals, in affirming, wrote an opinion (per McCord, C. J., R. 1460), not yet officially reported.

[1] Ester E. Stein and James R. Stewart.
[2] Criminal Code, Section 215, (18 U. S. C. Section 338).
[3] The Government relied for proof of mailing on a so-called "incoming mailing stamp". The proof developed that the "incoming mailing stamp" was placed indiscriminately on letters delivered by mail as well as letters delivered by messenger. No envelope was produced.

JURISDICTION.

The judgment of the Circuit Court of Appeals, affirming the conviction of petitioner was entered on March 29, 1943, (R. 1460). Petitioner's application for a rehearing was denied on April 24, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347). See also Rule 11 of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

STATUTE INVOLVED.

The mail fraud statute (Criminal Code Section 215, 18 U. S. C. Section 338, as amended) reads, in part, as follows:

> "Whoever, having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * in any * * * authorized depository for mail matter * * * shall be fined not more than $1000 or imprisoned not more than five years, or both."

STATEMENT OF THE CASE.

The indictment (R. 3) alleges that petitioner, with two others, one Ester E. Stein and one James R. Stewart, did

wilfully, knowingly and fraudulently devise a certain scheme to defraud the State of Louisiana and its subdivisions and agencies.

Count 1 alleges that the mails were used in furtherance of the scheme in that on January 4, 1939, the defendants placed and caused to be placed in the mails, a certain bill or statement for services rendered in reducing personal taxes for the year 1938, in the sum of $1129.22. The letter made the basis of Count II, addressed to the Intertype Corporation at Brooklyn, New York, gives a statement showing the amount of the reduction made and requests a check in payment for that service in the sum of $346.86. That mailing is alleged to have occurred on February 12, 1938. The mailings on Counts 4, 5 and 6 are bills or letters seeking the collection of fees for services rendered in connection with the reduction of tax assessments. All of the mailings were made subsequent to the entry of the tax assessment reductions on the State's records.

The nature of the scheme is alleged to be as follows: That the defendant, Stewart, was the chief clerk of the Louisiana Tax Commission, whose duty it was to recommend to the Louisiana Tax Commission the adjustment of errors and inequalities in tax assessments; that petitioner was a practicing attorney, and that Stein was a Notary Public; that petitioner, as attorney, would represent various taxpayers, and through Stein, would have Stewart make improper reductions of tax assessments, and that petitioner would charge as his fee 50% of the amount that the taxpayer saved by reason of the reduction; that such fees that were received by petitioner from his clients in connection with such reductions would be

divided between Stewart and Stein; and that Stein would act as the intermediary. The gist of the fraud is that the defendants employed dishonest means in obtaining the tax reductions by having Stewart, the Clerk of the Tax Commission, recommend improper reductions, for which he would unlawfully receive part of the money paid to petitioner by his clients; that Stewart would conceal this fact from the members of the Tax Commission; that the assessments on the properties were not excessive and improper prior to reduction, and were unfair and inequitable after reduction, and were in amounts below the actual cash value of the properties.

SPECIFICATION OF ERRORS.

I. The Court below erred in declining to pass upon serious legal and constitutional questions. Instead of stating the factual issues which petitioner contended had certain legal effects, the Court stated ultimate facts and excluded questions of law. Petitioner represents that this deprived him of due process of law in the Circuit Court of Appeals. We are aware that this Court will not correct ordinary errors of fact, or even law, but we firmly believe that this Court will in a proper case compel a Circuit Court to do its plain duty, and decide legal questions which litigants raise. We urge that the Circuit Court gave undue consideration to the "reprehensible" nature of the charge and inadequate consideration to the legal and Constitutional rights of petitioner.[3a]

[3a] To establish that the legal questions were not properly considered, petitioner attaches hereto, as an exhibit, copies of the brief filed in the Circuit Court, so that these may be available to this Court for reference only, should there be a challenge of our statements concerning the manner in which the questions were raised by petitioner and disposed of by the Circuit Court.

II. The Court below erred in holding that Wilkinson, who testified to a confession, was not a law enforcement officer.[4] The Court erred in holding that official promises by Wilkinson, to a young attorney whom he was investigating, to use his personal influence to secure leniency for that attorney, whereby a confession was obtained, did not, as a matter of law, constitute a "promise, inducement or hope of reward".[5]

III. The Court below erred in failing to pass upon the propriety of the District Judge actively participating in the trial of the case. The Court erred in stating that favorable questions on different subject matter cured the harm of illegal questions propounded by the trial judge. The real basis of the objection was to a series of questions by the District Judge which were argumentative, leading and suggestive, pertaining to a serious phase of the case—proof of mailing. Witness some of these questions reproduced in the appendix (see p. 31 et seq. hereof).

IV. The Court below erred in ruling that legal arguments should be held by respective counsel in *sotto voce* at the bench, out of the hearing of the defendant, his counsel, the public and the official court stenographer. The court further erred in permitting the District Attorney to argue legal objections in a whisper out of the presence

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[4] He was a duly elected officer of the State of Louisiana, charged with the duty of investigating and enforcing the law with reference to misconduct on the part of attorneys at law. His title was Member of Board of Governors, State Bar of Louisiana. He was elected not by the lawyers, but by the people, pursuant to State law, Act 10 of the 2nd Extra Session of the Legislature of Louisiana of 1934, Sections 8, 19, 25.

[5] Wilkinson admitted (R. 166) that he promised petitioner that if he would confess he would use his influence with the State Bar of Louisiana, the Judges of the Supreme Court, and further promised that if the matter got in such shape where any criminal prosecution followed, he would assist him with any district attorney, provided he cooperated.

of defendant and defense counsel, and out of the record. The Circuit Court decided only a minor phase of this complaint. The record shows at least thirty-eight instances of whispered argument, which we estimate lasted, in total, about three hours. The Court has failed to pass on the fact that the District Attorney made arguments out of the presence of defendant and his counsel; that counsel for other defendants made objections in whispers, which objections were not allowed to be placed of record, etc.[5a] The Court further erred in failing to pass upon the question formally presented wherein we contended that the "great historical constitutional rights" guaranteed by the Sixth Amendment should not be presumed to be impliedly waived unless the waiver is formally, affirmatively and legally obtained, after a full explanation and understanding of such rights.

V. The Court erred in failing to decide the legal question properly raised that authenticated photostatic copies of income tax returns were illegally admitted in evidence without any identifying witness having been called.

VI. The Court erred in holding that there was sufficient circumstantial evidence to prove that the indictment documents made the basis of Counts I and II of the indictment were mailed.

VII. The Court erred in holding that the indictment letters were in furtherance of the alleged scheme. These letters were mailed after the scheme was consummated.

[5a] This we contend deprived defendant of his rights under the Sixth Amendment to have a public trial, to be personally present at every stage of the trial, and to have the assistance of counsel.

VIII. The Court erred in holding that it is proper to admit testimony in a criminal trial where the evidence as to whether the testimony of an attorney-at-law is privileged is "in sharp conflict". This may be the rule in a civil case, but in a criminal case the defendant should be given the benefit of the doubt.

IX. The Court erred in not passing on petitioner's contention that the District Judge illegally permitted the Government to prove offenses *extra* the indictment. These extrinsic offenses were not offered for the purpose of showing intent, motive or system.

X. The Court erred in failing to adequately consider the complaint that the District Judge erred in unduly restricting the cross-examination of principal witnesses to show bias, interest and prejudice.[6]

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[6] The Circuit Court disposed of this important legal question summarily, to-wit: "Furthermore, the Court did not abuse its discretion in restricting cross-examination of Wilkinson regarding political matters."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. Petitioner was deprived of "due process of law" by the manner in which the Circuit Court, after concluding that a so-called "nefarious scheme" had been committed, was disinclined to give adequate consideration to whether Federal Court had jurisdiction of offense, and whether petitioner was legally convicted. The Circuit Court dismissed most important points summarily and with meager discussion of the law and facts. Thus the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Court devoted the major part of its brief opinion to a description of the scheme using such clauses as "nefarious scheme", " a fraud of the most reprehensible kind".[1] After painting a picture of a most heinous offense, the Court thereupon summarily dismissed the various constitutional and legal matters seriously urged. The Court ignored sound legal points of law, and considered these as questions of fact. Petitioner was therefore deprived of his day in the Circuit Court of Appeals, and of due process of law. When a Court writes an opinion stating only ultimate facts it is exceedingly difficult under the rules of this Court requiring conciseness to show an extraordinary occasion calling for the intervention of this Court. From a reading of the opinion it would appear that only

[1] The gist of the offense is the use of the mails. The federal courts have no jurisdiction unless the mails are used. Quo ad the federal jurisdiction the "reprehensible" character of the scheme minus the use of the mails in furtherance thereof does not create federal jurisdiction. The question raised as to the actual proof of mailing was treated as a subordinate matter.

questions of fact were involved. Actually, the facts were admitted and undisputed, and there was involved only questions of law.

We also submit that the result reached below was due to a disinclination on the part of the Circuit Court to deal with jurisdictional, legal and constitutional questions, which are fully spread on the record, having decided that a "nefarious" and "reprehensible" scheme had been perpetrated.

Appellate Courts were created to insure that even a guilty defendant has been *legally* convicted. It is the duty of his counsel to insist that he be accorded "due process of law".[8] The Circuit Court has taken a narrow view of its duties in reviewing constitutional questions in a case where it concludes that the character of the offense was "reprehensible".

We submit that this Court is committed to the larger duty of reviewing claims of prejudice.[9]

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[8] Canon of Professional Ethics of the American Bar Association issued September 30, 1937: 5. "It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

[9] See New York C. R. Co. v. Johnson, 279 U. S. 310; Berger v. U. S., 295 U. S. 78; McNabb et al v. U. S., ... U. S. ....., 63 Sup. Ct. 608.

II. In overruling the claim that a confession was obtained as a result of "promises, inducements, and hope of reward" by a public official charged with the duty of enforcing certain laws, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, and has rendered a decision probably in conflict with the decisions of another Circuit Court of Appeals.

Mr. Hugh M. Wilkinson was allowed to testify over objection (R. 190) to an alleged confession made to him by petitioner.

The Court erred in holding that Mr. Wilkinson was not a law enforcement officer. Mr. Wilkinson was a member of the Board of Governors of the State Bar of Louisiana, (not the ordinary Bar Association). He testified that he was a law enforcement officer, (R. 145 also 148.) He stated that he reminded Mr. Steiner early in the conversation that if improper professional misconduct was involved, *that he, Wilkinson, would be required to make an investigation and that he would not undertake to represent any lawyer who had gotten involved in professional misconduct, because it would be his duty to investigate and pass on that misconduct himself.* The witness was an elected public official of the State of Louisiana. (R. 145, 146, 147.) He was elected by the people of his district, not by the lawyers. His powers and duties are provided by State law.[10]

[10] Act No. 10 of the 2nd Extra Session of the State of Louisiana for the year 1934, provided for witness' powers and duties to enforce the law; the pertinent sections being as follows: "There is hereby constituted a board of governors of the state bar, which shall consist of one (1) member elected by the people from each congressional district of the State of Louisiana, who shall hold office for the period of two years; said election of members of the board of governors of the state bar from the congressional districts of Louisiana to be had at every regular congressional election in this

Agreement by public official to use influence to secure leniency constitutes in law "a promise, inducement or hope of reward" invalidating confession.

The Court erred in stating that the confession was not made as a result of "promises, inducements and hope of reward", because the witness "merely offered to lend his personal influence to secure leniency" for petitioner.[11] If the Court of Appeals means that a confession may be obtained by a public official having power to investigate and enforce violations of law by promising to lend his personal influence to secure leniency, then we submit, that the Court has erred in its finding of the legal meaning of a "promise, inducement or hope of reward.[12]

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state, with the regular party selections at the regular party primary elections, as now provided by law; membership of the board of governors of the state bar is hereby and herewith declared to be a public office." Section 8.

"The Board shall be charged with the executive functions of the state bar and the enforcement of the provisions of this act." Section 19.

"It shall be the duty of the board of governors, and it shall have the power, to receive and investigate complaints as to the conduct of members, make findings and recommendations, in their discretion, to the legally constituted disbarment authorities." Section 25.

[11] The Court disposed of the whole intricate problem with the following brief statement: "There is no merit in the contention that the statements made by Steiner to Wilkinson constituted an involuntary confession made as a result of "promises, inducements, and hopes of reward." Wilkinson merely offered to lend his personal influence to secure leniency for Steiner. Wilkinson was not a law enforcement officer. Steiner was not in custody or under arrest, and no force, coercion, or duress was used to procure the statements. The statements were voluntarily made and were admissible in evidence."

[12] Bram v. U. S., 168 U. S. 532.

"But a confession in order to be admissible must be free and voluntary, that is must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, HOWEVER SLIGHT, * * * AND * * * ANY DOUBT AS TO WHETHER THE CONFESSION WAS VOLUNTARY MUST BE DETERMINED IN FAVOR OF THE ACCUSED."

See also: 3 Russell on Crimes, 6th Edition 478; Sorenson et al. v. U. S., (C. C. A. 8), 143 F. 820; Ziang Sung Wan v. U. S., 266 U. S. 1; U. S. v. Pocklington, 27 Fed. Cas. No. 16,060 (C. C. D. C.); Wilson v. U. S., 162 U. S. 613; State v. Williamson, 339 Mo. 1038, 99 S. W. (2d) 76; U. S. v. Cooper, 25 Fed. Cas. No. 14,864; U. S. v. Nardello, A. Mackey 503, 15 D. C. 503; Chambers v. Florida, 309 U. S. 227.

A confession is invalid and inadmissible, if the circumstances, of whatever nature, make it the result of the subjection of the will of the one confessing to that of the other.[13]

The Circuit Court of Appeals has found as a fact that, "Wilkinson merely offered to lend his personal influence to secure leniency for Steiner". This is an obvious admission that the confession was obtained as a result of "inducements, promises and hope of reward". Where an influential public official promises in return for a confession, to lend his influence to secure leniency for a person who is described in the Circuit Court's opinion as being "cornered and trapped" and "facing detection and disgrace",[14] that should be held to invalidate a confession.

The philosophy underlying that rule is a due regard for the constitutional provision set forth in the Fifth Amendment. The policy of the courts is to exclude confessions where there is the slightest promise, because the psychological factors which are so difficult to weigh make such statements untrustworthy. There is no method known to science by which there can be measured the effect of the inducements made by Wilkinson to petitioner. (See Note 12, p. 12.) Hence, *ex necessitate rei*, courts exclude such confessions where any degree of influence is exerted.

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[13] McAfee v. U. S., (C. C. A. D. C.) 105 F. (2d) 21; citing Wan v. U. S., 266 U. S. 1; Perrygo v. U. S., 80 F. (2d) 181.

[14] On Page 3 of the opinion Judge McCord said: "Cornered and trapped by his dissatisfied confederates, and facing detection and disgrace, Steiner thereupon sought out an officer of the Louisiana Bar Association and attempted to gain immunity for himself by turning informer against his partners and others whom he named and alleged were engaged in the unlawful 'tax racket'."

The record shows (R. 121) that petitioner went to the witness' law office for the purpose of employing him as an attorney to represent him, for the co-defendants in this case were hounding him for money.[14a] He gave him some of the facts in the case. Petitioner was then at Wilkinson's mercy, assuming the statements to Wilkinson were not privileged. Wilkinson then made the promises which caused petitioner to confess all the details which made this case possible.[15]

Finally, we submit, that even if Mr. Wilkinson were not a law enforcement officer, but was a private attorney or private citizen, that if petitioner were subjected to his will by reason of the peculiar situation in which he found himself, as well as by reason of the alluring promises, inducements and hope of reward held out to him by the

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[14a] Petitioner did not testify before the jury, and the matter of the weight to be given to the confession was not submitted to the jury by the District Judge. No charge was given on the weight to be given to the confession. The issue of law which was decided by the Trial Court in admitting the statements made by petitioner did not, therefore, become a question of fact foreclosed by the jury's general verdict of guilty. See McNabb et al v. U. S., ... U. S. ....., 63 Sup. Ct. 608, 612, note 5.

[15] Mr. Wilkinson's admission that he made promises to petitioner was testified to by him (R. 166) as follows:

"Naturally he was. And, because of his usefulness, I told him if he co-operated with me honestly and showed what I considered would be a proper repentant spirit after the mess he had gotten himself into as a young lawyer, who had been before the Bar only a short time, **I would go before the State Bar of Louisiana, before the Judges of the Supreme Court and before any DISTRICT ATTORNEY, and tell them that he had been useful, and that he had been honest and straight-forward after he came to me,** and while I could give him no assurance that I had any power to bind anybody, neither any member of the Board of Governors, nor the Judges nor the District Attorney if only he would co-operate with me, **I would give my personal recommendation to such indulgence or lenience he might be entitled to, either before the constituted authority for discipline for the Bar, or, if the matter got into such shape where any criminal prosecution followed, I would endeavor to assist him there.—provided he co-operated,—AND THAT WAS THE BASIS on which he continued to work for the rest of the week, and our relations were not on the basis of attorney and client.**

witness, such a confession would be equally invalid and inadmissible.[16]

III. In overruling petitioner's contention that he was denied a fair trial, because the Trial Judge was permitted to propound illegal questions that even the prosecutor should not have been permitted to ask, the Circuit Court has sub silentio sanctioned a departure by the Trial Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Circuit Court stated the question raised under this heading to be as follows:

> "Complaint is made of the fact that the trial judge questioned certain witnesses during the trial."

The Court then proceeded to find that because in certain instances the Judge's questions proved favorable to Steiner, that his illegal and damaging actions and questions are *ipso facto* cured.

The principal question presented under this heading was a complaint to a series of illegal and prejudicial questions propounded by the judge *quo ad* the proof of mailing—a subject highly controverted on the trial. The Judge propounded an extended series of illegal questions.[17] Even the prosecuting attorney would not be legally entitled to ask such questions on a highly controverted subject.[18]

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[16] Underhill's 4th Edition, Section 268; Whip v. State, 143 Miss. 757; 109 So. 697.

"A confession may be involuntary if the circumstances, of whatever nature, are such as make it the result of the subjection of the will of the one confessing to that of another." McAfee v. U. S., (C. C. A. D. C.) 105 F. (2d) 21, (citing) Wan v. U. S., 266 U. S. 1; Perrygo v. U. S., 80 Fed. (2d) 181.

[17] These are reproduced for the Court's convenience in the Appendix. (See p. 31 hereof.)

[18] Nurnberger v. U. S., (C. C. A. 8) 156 F. 721, syllabus and p. 735. See also Hunter v. U. S., (C. C. A. 5) 62 F. (2d) 217.

In addition to asking improper questions, the Judge was most active in questioning witnesses throughout the trial, and with few exceptions acted on the side of the prosecution.[19]

Though true that a judge is not a mere arbiter, it is also true that Congress wisely placed the burden of the prosecution on the United States Attorney and really intended that the United States Judge remain impartial.[20] And the Courts have generally held that it is improper for district judges to act as advocates.[21]

It appears unsound both in law and in logic for the Court to hold that if the judge asks illegal questions on an important part of the case, that his actions are cured if some of his other questions are favorable. The District Judge in his charge to the jury admitted that he pursued a "very emphatic manner and too insistent a following up of questions".[22] Because the District Judge stated to the

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[19] See R. 305-306; R. 307-308, where, on objection that the Court was going "a little far afield," the court discontinued the questions and stated: "The Court: 'This is a little too far afield'." See also R. 348; 356-357; 370; 388; 432; 433; 447-449; 466-467; 472; 493-494; 516-517; 555-557; (see objection to part of this examination); 627-628; 632-633. See also R. 291-293 where the witness was permitted over objection to give it as his opinion that certain payments to a defendant was "just plain graft". See also R. 136-140; 171-172.

[20] R. S. 771, (Title 28, U. S. C. 485.)

[21] Williams v. U. S., (C. C. A. 9) 93 F. (2d) 685 and authorities cited therein; see also Adler v. U. S., (C. C. A. 5) 182 F. 464, 472, 473; Hunter v. U. S., (C. C. A. 5) 62 F. (2d) 217, 220.

[22] In his charge (R. 753) the District Judge stated:

"I did examine on various occasions some of the witnesses with reference to particular matters I felt should be brought out more clearly. May I caution you, at this time, to remember that you are to take notice, in your appreciation of the evidence which may have been presented to you by virtue of that questioning, of only the questions and answers. **You are to pay no attention at all to what may then have appeared to you to be a very emphatic manner and too insistent a following-up of questions.** You are to permit that, in no manner, to prejudice you either against the witness, or against the persons with reference to whom that particular part of the evidence was then being given. You are the judges of the evidence. You are not the judge of the demeanor of the judge."

jury that they were not to regard his mannerisms, the Circuit Court construed that charge to mean that this harm was cured, but overlooked the fact that the District Judge did not instruct the jury to disregard the objectionable questions propounded by him. The jury was only instructed to disregard his demeanor.

IV. In overruling the claim that petitioner was denied certain rights guaranteed to him under the Sixth Amendment, to-wit: The right to a public trial, the right to assistance of counsel, and the right to be present at every stage of the trial, the Court decided a federal question probably in conflict with applicable decisions of this Court in holding that the aforesaid rights could be impliedly waived.

The trial lasted five days. The District Judge ruled that all legal arguments as to the competency of the witnesses and as to the admissibility of evidence, etc. would be argued in whispers at his bench, and in that manner the jury, the public and the defendants and petitioner and at times his counsel were not apprised of that part of the trial. (R. 86.) The official stenographer could not record the proceedings at these private conferences.[23]

The Circuit Court paraphrasing the language of Mr. Justice Frankfurter in the *Johnson* case [24] states that "The contention seems to be nothing but an after-thought by

[23] The official stenographer noted each instance—38 in all—the following being typical and illustrative (R. 655): "At this time at the judge's bench there occurred a conference between Mr. Hamlin, Mr. Christenberry and the Court in sotto voce. (Note Mr. Hamlin was attorney for another defendant, not for petitioner; Mr. Christenberry was United States Attorney.) To illustrate further, (R. 251), "At this point there occurred a conference between the Court and the District Attorney in sotto voce."

[24] In the concurring opinion in Johnson v. U. S., (decided Feb. 15, 1943), ... U. S. .....

which fair conduct, in which they acquiesced and participated, is sought to be distorted into impropriety and alleged prejudicial error."

This case is not comparable to the *Johnson* case,[25] in which there was an isolated instance where the defendant was required to retire from the court room for a few minutes while his counsel argued for his right to refuse to answer certain questions—which right was granted to him as soon as he returned.

This, on the contrary, is a case where for days, a district court of the United States has held most important parts of the trial in secret; permitted the district attorney to argue legal questions out of the presence of the defendant and his counsel—thus depriving the defendant of the assistance of his counsel; permitted counsel for other defendants to make objections in *sotto voce,* not letting the objection be placed of record; ruling on objections made by counsel for other defendants when petitioner and his counsel were not informed of the objection, the record only showing that the objection was overruled.[26]

This is not a case like the one in which Mr. Justice Frankfurter used such emphatic language. This is a case [27] where several hours of the trial were held in whispers. This is a case where procedure contravening the Constitution is sanctioned by a Circuit Court which is disinclined to deal in broad constitutional rights after having found that "a nefarious scheme" had been committed. This is

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[25] Johnson v. U. S., (decided Feb. 15, 1943), ... U. S. .....
[26] See original brief filed as an exhibit for instances of the procedure, pp. 118-124.
[27] See appendix, p. 36 for reference to instances and record pages.

not the kind of trivial situation which this court dealt with in the *Johnson* case. This is a case where a method of trial is sanctioned by the Circuit Court which raises a danger of reverting to an ancient evil—the Star Chamber of England. By such trial practice there is danger of first undermining the important constitutional right of public trial and then finally destroying it.[27a]

Nor is it proper to lightly dismiss propositions that involve "the great historical constitutional rights" on the basis of an implied waiver of such rights.[28] This court has committed itself to a larger duty in reviewing claims of prejudice with a view of placing a duty on the trial courts to preserve such rights inviolate. This court has held that such rights can not be impliedly waived. If the doctrine of waiver is ever applied, it can be only in cases where the waiver is made in due form of law, that is, formally, knowingly and affirmatively.[29]

That defendants are entitled to public trial in federal courts is elementary.[30] Defendants' rights to have assistance of counsel have always been strictly enforced.[31] If his counsel is not permitted to hear the objections or arguments of the district attorney or those made by other defense counsel or have the benefit of the official record, then

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[27a] It is noteworthy that the Circuit Court did not even mention the 6th Amendment in deciding this question.

[28] c/f Adams v. U. S., ... U. S. ....., 87 L. Ed. 209.

[29] Glasser v. U. S., 315 U. S. 60, 69; Johnson v. Zerbst, 304 U. S. 458, 462, 463. See also Dillingham v. U. S., (C. C. A. 5) 76 F. (2d) 36 (syllabus) c/f Fina v. U. S., (C. C. A. 10) 46 F. (2d) 643, 644, 645; Adams v. U. S., ... U. S. .....; 87 L. Ed. 209.

[30] Const. Amendment VI; Davis v. U. S., (C. C. A. 8) 247 F. 394, 395, 398—c/f People v. Stangler, Cal. App. 1941, 111 P. (2d) 397 (syllabus).

[31] See Johnson v. Zerbst, 304 U. S. 458, 462, 463; Glasser v. U. S., 315 U. S. 60, 69.

the defendant is not accorded the benefit of counsel, nor is he accorded the mode of trial that has heretofore been traditional. The Bill of Rights would not be the great bulwark of protection to defendants in criminal trials if these great constitutional rights can lightly be held to be waived. Respect for the impartial administration of justice would seem to require that when constitutional rights such as are here involved are held to be impliedly waived that a full statement of the facts and circumstances should be set forth in the opinion.

V. In holding that the Government may offer in evidence photostatic copies of income tax returns, authenticated pursuant to Sec. 882 of the Revised Statutes of the United States (Title 28, U. S. C., 661) without identification by any witness, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

For the purpose of showing that one of petitioner's co-defendants was reporting more income than he was earning as salary—from which it would be inferred that he was being bribed by petitioner, the government offered in evidence photostatic copies of the income tax returns of that defendant, duly authenticated pursuant to law.[32] (R. 286.)

No witness identified the returns.[33]

The Circuit Court disposed of the question without giv-

[32] Sec. 882 R. S.—Title 28, U. S. C. 661, reading as follows: "Copies of * * * documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."

[33] It has heretofore been customary for the government to call the notary public who attested the return, but in this case the return was offered over objection, without identification.

ing any comment as to the legal questions raised.[34] As far as our research discloses, this question has not been passed upon by this Court or any of the Circuit Courts.[35] The sole purpose of this Act was to make the authenticated photostatic copy of the document equal to the original; and where the original is not competent, if produced, a copy is incompetent.[36] In this case if the original income tax return had been produced some identification of it would have been required, but secondary evidence of the existence of the return was produced, and less evidence was required than had the original been offered.

VI. In holding that there was circumstantial evidence proof of mailing of the indictment letters made the basis of Counts I and II of the indictment, the Circuit Court of Appeals has decided a question of federal law in a way probably in conflict with applicable decisions of this Court, and decisions of other Circuits Courts of Appeal.

The evidence adduced to prove a mailing of the Count I indictment document is summarized in the Court's opinion. (R. 1463.)[37] The evidence there summarized is sub-

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[34] The court merely stated, "After a careful review of the record we find no reversible error in the rulings of the court as to the admission or exclusion of evidence, including admission of duly authenticated photostatic copies of income tax returns."

[35] The point raised here is not similar to such cases as Mansfield v. U. S., (C. C. A. 8) 76 F. (2d) 224, and Lewy v. U. S., (C. C. A. 7) 29 F. (2d) 462, for in those cases the question was not raised as to the proper identification of the document.

[36] Ex parte Lamantia, (D. C. N. Y.) 206 F. 330.

[37] The following is the Court's summary of the evidence to sustain Count I: "It was on the billhead of 'Steiner & Stein' and was addressed to Longino & Collins, 3801 Tulane Avenue, New Orleans, La. The witness R. K. Longino produced the letter from his files, and testified that the statement was found with the stamped and post-marked envelope pinned to it. The bill bore date of December 31, 1938, and the envelope bore a postmark dated January 4, 1939. The witness Hugh M. Wilkinson, to whom Steiner had revealed the details of the scheme, and who had discussed a similar statement with Steiner, testified that Steiner had said that when a customer failed to pay the agreed fee, 'Stewart himself would mail

stantially given as it is reflected in the record, except that the Court overlooked stating that the witness whose testimony is summarized testified further, as follow (R. 419, 420):

"Q. Was this letter received by you?

"A. No, sir. You mean this document (indicating document in hand).

"Q. Yes.

"A. No, sir, I never saw it until I asked for the file."

We submit that the Court erred in finding as a matter of law that such facts constituted circumstantial evidence of mailing. This Court has held that when the government relies entirely on circumstantial evidence to prove a fact, the circumstances must be proved and not themselves presumed. The court erred in not passing upon the question of law raised in connection with these undisputed facts.[38]

There is no direct or circumstantial evidence that the indictment document was ever mailed. A presumption of mailing was accepted by the Court by basing presumptions on remote presumptions admittedly not proved at all. To illustrate, it is accepted as proved that the indictment

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this bill on the billhead of Steiner and Stein' * * *." (The Court, in referring to the testimony of Wilkinson, of course, refers not to the indictment billhead, but a similar one; therefore, that testimony adds nothing to the proof of the mailing of the indictment document.)

[38] The very important difference between proving circumstances and presuming them—or in other words, basing presumptions on presumptions was first clearly pointed out by this court in U. S. v. Ross, 92 U. S. 281. The principle was afterwards applied in nearly all of the Circuits c/f Mackett v. U. S., (C. C. A. 7) 90 F. (2d) 462; U. S. v. Baker, (C. C. A. 2) 50 F. (2d) 122; Freeman v. U. S., (C. C. A. 3) 20 F. (2d) 748; Brady v. U. S., (C. C. A. 8) 24 F. (2d) 399; Rosenberg v. U. S., (C. C. A. 10) 120 F. (2d) 935; Whealton v. U. S., (C. C. A. 3) 113 F. (2d) 710.

document, which bore a different date than the envelope, both of which were found attached in a file, were pinned together by the person who received the envelope. It seems very improper under the legal rule laid down by this Court to presume, without some evidence or other circumstances, that a document was received by mail merely because that document was found by a person knowing no other facts about it pinned to an envelope bearing a post-mark. To arrive at such a result, the Court is compelled to presume circumstances that are not proved, i. e., that it was the office practice for the person opening the mail to pin the envelope to the document which it contained. It is just as fair to presume that some clerk in adjusting the file pinned the envelope to the billhead and that the billhead was not received in that particular envelope.

The Proof As To Count II.

The Court erred in finding that there was sufficient circumstantial evidence to prove a mailing and the venue as to Count II of the indictment.[39] The Court erred in finding that the two witnesses stated that the letter was received in due course through the mail. They

[39] The Court found the facts as to the mailing of Count II letter to be as follows: "The collection letter forming the basis of the second count was written to Intertype Corporation, 360 Furman Street, Brooklyn, New York. The letter was typed for Steiner by his secretary; it requested payment of the account 'by return mail'. The letter bore date of February 12, 1938, and was received in the New York office of Intertype two days later on February 14, 1938. An officer and an employee of Intertype Corporation testified to the manner of handling mail in the New York office, and that his letter was received by Intertype Corporation in due course through the mail." (N. B. The charge was that the letter was mailed at New Orleans, not that it was received by mail in New York. There was no proof whatsoever that the letter was mailed at New Orleans. The envelope was not produced or accounted for.)

merely gave it as their opinion based on a so-called "incoming mail stamp", that the letter was received by mail.

H. A. Grube (R. 621) testified:

> "A. I did not receive the mail, but it came to my desk after it is opened, and that would be received at the receiving desk. . . .
> "Q. After looking at the letter [meaning after looking at the 'incoming mail stamp on the letter'] how would you say that that letter was delivered to your office?
> "A. I would say [meaning, of course, it is my opinion] that it came through the mail."

James R. Stewart (R. 635):

> "Q. I show you now G-232, which is a letter addressed to your company, and I will ask you if that letter bears the same stamp, showing that it was received in the incoming mail.
> "A. Same stamp, checked by the same man, and carried to Mr. Grube.
> "Q. Now, having looked at those two documents [meaning, of course, having looked at the 'incoming mail stamp' on the two documents] Mr. Stewart, how were they received? How were they received by your office in Brooklyn? [Meaning, of course, what is your opinion based on the 'incoming mail stamp'.]
> "A. They were received by mail."

The Court erred in declining to decide the legal question presented to-wit: Where the government does not produce the envelope showing a canceled stamp and postmark, is opinion evidence based on a so-called "incoming mail stamp" sufficient especially where the evidence shows

the same stamp is placed on letters which are delivered other than by mail? [40]

The Court erred in failing to give consideration to the decision of the Second Circuit [41] holding that where witness evaluates imprint of so-called "incoming mail stamp" [42] the evidence is insufficient where the record does not show whether the incoming mail stamp is placed on letters delivered other than by mail. The *Baker* case was strongly relied upon in our brief filed in the Circuit Court [43] but the Court did not discuss it, although the holding in that case is clearly in conflict with the holding of the Circuit Court in this case.

VII. It was error for Circuit Court to artificially extend scheme; scheme was consummated when assessments were actually reduced on books of tax collecting authorities; letters written after scheme consummated are not in furtherance of scheme; nor does a contract which is performed to the satisfaction of both parties violate mail fraud statute merely because one of the parties to the contract violates some state statute in carrying out the contract; the Circuit Court by holding such transactions to come within the purview of the mail fraud statute has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided that question in a way probably in conflict with decisions of other Circuit Courts of Appeals.

The Court erred in holding that the mails were used in execution of the scheme. The scheme, as alleged, was to

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[40] The District Attorney dismissed Count III—which was based on the same type of evidence ("incoming mail stamp" on letter), when witness admitted that same stamp was placed on letters that were delivered by messenger.

[41] U. S. v. Baker, (C. C. A. 2) 50 F. (2d) 122.

[42] The so-called "incoming mail stamp" is placed on all letters received over letter desk. It shows date received and also individual or Department to whom it should be delivered by the letter clerk.

[43] See petitioner's brief filed as an exhibit to the appendix citing the Baker case on pages 49, 58, 64, 67, 76, 79, 85.

defraud the State and its agencies by making illegal tax assessment reductions. All letters were mailed after the reductions were made, and the scheme consummated. The Court erred in holding that the indictment charged a continuous and operating scheme to defraud, and the mails were used in furtherance thereof. The scheme was not set up in the indictment as continuous. Each count was treated as a separate offense, and petitioner was separately sentenced.[44] The fees collected were from parties not alleged to be victims, hence, letters were not in furtherance of scheme.

Nor could the theory advanced in the concurring opinion be correct, for that would assume that the mail fraud statute covered contracts where pecuniary or property injuries were not to be inflicted, but, on the contrary, the clients were to receive a benefit. Under the theory of the learned author of the concurring opinion, whenever a contract would be entered into that was carried out to the entire satisfaction of both parties, but where one party violated some state statute or accomplished the object of the contract by some immoral or dishonest means, the mail fraud statute would be violated. This, we submit, is carrying the mail fraud statute too far.[45]

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[44] The defendant was not given a five year sentence which is the maximum that the defendant could receive for a continuous scheme, but was given fourteen years, and was sentenced and also fined upon each of the counts individually. Each count was treated as a separate and distinct offense. A similar situation was recently discussed in Dyhre v. Hudspeth, (C. C. A. 10) 106 F. (2d) 286, 288. c/f Spillers v. U. S., (C. C. A. 5) 47 F. (2d) 893; Stapp et al. v. U. S. (C. C. A. 5) 120 F. (2d) 898; Stewart v. U. S., (C. C. A. 8) 300 F. 769, 775; McLendon v. U. S., (C. C. A. 6) 2 F. (2d) 660; Munch v. U. S., (C. C. A. 5) 24 F. (2d) 518; Merrill v. U. S., (C. C. A. 9) 95 F. (2d) 669.

[45] Fasulo v. U. S., 272 U. S. 620, rev'g. 7 F. (2d) 961 (C. C. A. 9): Hammerschmidt v. U. S., 265 U. S. 182.

VIII. In holding that in a criminal case, where "the evidence was in sharp conflict" as to whether the testimony of an attorney-at-law is inadmissible as being privileged that it is proper to admit the testimony without considering the rule of law that the defendant in a criminal case is entitled to benefit of reasonable doubt, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

Petitioner testified that he went to Mr. Wilkinson's law office to consult him as an attorney and related to him the matters about which Mr. Wilkinson testified on the trial of the case. (R. 121). Mr. Wilkinson testified that he reminded petitioner early in the conversation that if improper professional misconduct was involved that he would be required to make an investigation. (R. 145-148.)[46]

It was contended in the court below that it was the state of mind of the client, and not the attorney which was the determining factor as to whether the communication to the lawyer was privileged.[47] The Circuit Court did not decide that question.

The Circuit Court found that the issue on the preliminary question was foreclosed by the finding of fact of the district court. This Court has held that such preliminary questions of fact decided by the district judge are subject to appropriate review on appeal.[48]

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[46] As to Mr. Wilkinson's official status see p. 11 hereof.

[47] Lew Moy v. U. S., (C. C. A. 8) 237 F. 50, 53, holding, "In questions of this kind consideration should be given to the attitude, the intent and Belief, Of The Person Seeking Advice Or Assistance." See also 70 C. J. 545.

[48] c/f Nardone v. U. S., 308 U. S. 338, 341; McNabb et al. v. U. S., ... U. S. ....., 63 Sup. Ct. 608, 616.

It is elementary that a defendant on trial in a criminal case is entitled to the benefit of a reasonable doubt. The Circuit Court finds a sharp conflict in the evidence [49] as to whether the relationship of attorney and client existed, but gave no consideration to the rule of "reasonable doubt" in criminal cases in connection with this kind of evidence. The point at issue here, which has not been decided by the Circuit Court, is, if there is any reasonable doubt whether the communication be privileged or not, the accused in a criminal trial should have the benefit of the doubt.[50] This is a most important federal question which has not heretofore been decided by this court or any of the Circuit Courts of Appeal, as far as our research has disclosed.

IX. In failing to pass on contention that District Judge illegally permitted the Government to prove offenses extra the indictment which offenses were not offered for the purpose of showing intent, motive or system the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings in an appellate court as to call for the exercise of this Court's power of supervision.

The government was permitted over objection to prove by the testimony of one Sternberg (R. 643) that one of petitioner's co-defendants,[51] engaged in a tax reduction scheme on his own account at various times, not in connection with petitioner or the other co-defendant (Stein).[52] The Court permitted the Government to prove that in

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[49] The evidence was heard by the trial judge out of the presence of the jury, and was not repeated before the jury. Petitioner did not take the stand before the jury.

[50] Underhill's Criminal Evidence, (4th Ed.) Sec. 334, at p. 641; Wharton's Criminal Evidence, (10th Ed.) Sec. 497, at p. 1033.

[51] Stewart, the clerk employed in the Office of the Tax Commission.

[52] The scheme as alleged was that petitioner would use his position to get clients, that he would use Ester Stein as a "go-between" to bribe Stewart to make illegal tax assessments.

certain instances Stewart himself was bribed directly by certain taxpayers in New Orleans. In those instances petitioner had no part in the transactions at all.[53] If this defendant is to have "his day in Court" he should have the point passed upon, for that was illegal testimony that was most prejudicial to his case. It is not sufficient for the court to say that "the government proved the essential elements of the offense", when the real contention was that the government went beyond proving the elements of the offense.[54]

X. The Court in holding that the District Judge properly exercised his discretion in unduly restricting cross-examination to show hostile interest, bias and prejudice has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Petitioner contended under this heading that he had consulted Mr. Wilkinson under the bona fide belief that there would be a relationship of attorney and client existing between him and Mr. Wilkinson. (R. 121.) Mr. Wilkinson, shortly thereafter, delivered a radio address revealing all of the information petitioner gave him. (R. 160.) It was contended that the witness had not acted as an impartial investigator, but was using the information for political speeches; that he was biased, interested and prejudiced.[55] The language of the Court shows clearly

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[53] The Court dismissed this contention with the following irrelevant remark "a careful review of the evidence in this rather lengthy record discloses that the government proved the essential elements of the offense charged and that there was no fatal variance between the charges and the proof."

[54] The evidence was not offered for restricted purposes, i. e., to prove motive, intent or system.

[55] The Circuit Court also summarily dismissed the point in a single sentence, as follows: "Furthermore, the court did not abuse its discretion in restricting cross-examination of Wilkinson regarding political matters."

that proper consideration was not given to the matter. The cross-examination was not to show "political matters", it was aimed at speeches that the witness made, speeches that directly concerned the case on trial. The formal offer of proof shows that the cross-examination was calculated to show the hostile motive, interest and biased attitude of the witness. This witness testified to most damaging statements alleged to have been made by petitioner. The only way open to petitioner was to cross-examine this witness to show his bias. This Court has held in a case involving a similar situation,[56] that it was prejudicial error to deny reasonable latitude in cross-examination. It is always permissible to show the interest, bias and prejudice of the witness.[57]

CONCLUSION.

For the foregoing reasons, petitioner, by his solicitors, respectfully prays that writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to the end that the cause may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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[56] Alford v. U. S., 282 U. S. 687.
[57] King v. U. S., (C. C. A. 5) 112 F. 988.

APPENDIX.

We now reproduce here from R. 598-601, the questions and answers complained of (See p. 15 et seq. hereof) with our comments as to the objectionable nature of each question (R. 598).

"Cross Examination.

"Mr. Dowling:

"Mr. Chadwick, you have been shown a document which is marked G231. Did you sign that?

"A. Yes, sir.

"Q. After you signed it, what did you do with it yourself?

"A. Put it in the file basket for the clerk to put in the mail box.

"Q. You put it in the file basket for the clerk to put in the mail box?

"A. Yes.

"Q. Did you ever see it anywhere else in connection with this case?

"A. No, sir.

"Q. What became of it, after you put it in the file basket, you do not know of your own knowledge?

"A. No, sir.

"Q. That is all.

"The Court: "But you do know that the usual course to be pursued with letters that you were writing to your employer had to be directed out of town, don't you?	(Argumentative, leading and suggestive. Also assumes truth of controverted matter.)

"A. Yes, your Honor."

"Q. And you do know subsequently you had definite, subsequent information that your letter had been received in New York, don't you?
"A. Yes, yes."

(Leading and suggestive, and hearsay.)

"Q. And you recognize even the stamp of your New York office upon the letter which shows that it was actually so received?
"A. Yes, your Honor."

(Leading, suggestive and calling for opinion, and giving the court's opinion.)

"Q. Now, may I ask you these questions: You stated that Mr. Steiner was engaged in attending to certain business matters for you personally?
"A. Yes, sir."

(Improper repetition of testimony already given.)

"Q. And in the course of a visit he suggested his employment by your company, because he felt he could bring about reductions in your assessments. Is that true?
"A. Yes, sir."

(Improper repetition of testimony already given.)

"Q. Did he indicate why he so thought? Did he tell you that he had examined your assess-

(Argumentative question. Being hypothetical and contained several questions in one. The

ments and they, to him, looked high, or where did he get any information, or did he intimate to you he had any such information about the condition of your assessments?

"A. No, sir. He would find out what the assessment was from the assessor's office."

answer, "no, sir" is, of course, naturally misleading.)

"Q. But before that, without e v e n having done that, he told you he thought he could bring about reductions?

"A. Yes."

(Argumentative, leading and suggestive.)

"Q. He had no knowledge what the assessment was, but was volunteering information to you that he felt reasonably sure of being able to get reductions if employed by your company?

"A. Yes, sir."

(Argumentative, leading and suggestive. Assumes truth of controverted matter.)

"Q. You had shown him no tax bill or any assessment papers from which he could come to a conclusion on the subject, had you?

"A. No, sir."

(Leading and suggestive.)

"Q. You had not discussed any details at all about your assessments?
"A. No, sir." (Leading and suggestive.)

"Q. He had not asked you whether your assessments were high or low or what?
"A. No, sir." (Leading and suggestive.)

"Mr. Dowling:
"As to all the leading questions put by the Court, we reserve a bill, and make all the questions and answers a part of the bill.

"The Court:
"What is that?

"Mr. Dowling:
"If your Honor please: You asked a good many leading questions.

"The Court:
"Why did you not object at the time they were being asked?

"Mr. Dowling:
"I am objecting now.

"The Court:
"Mr. Dowling, do you state the Court has no discretion to ask leading questions?

"Mr. Dowling:
"I am objecting to it as being leading questions.

"The Court:
"The Court has the discretion to permit leading questions, and the ruling of the Court is, despite the objection of counsel, and the Court is of the opinion there is no real legal objection to any questions put.

"Mr. Dowling:

"With all due respect to the Court, I must, on behalf of a man, whom it is my duty as an officer of your Court, see that all legal rights are taken care of, and I object to all the statements made and ask to have all that part of the record made a part of the bill of exceptions if your Honor please.

"The Court:

"Let it be noted, and let the testimony be incorporated in the bill.

"Mr. Dowling:

"Now, I am going to ask you one other question, and I would like you to answer me. You took an oath and the judge told you what the oath was,—before your God and conscience, do you know, of your own knowledge, whether—as a fact—this letter ever went through the mail? Can you say you do?

"A. The fact it bears our New York office stamp indicates it went through the mail.

"Q. But, do you know that it did yourself?

"A. No, sir, I cannot follow a letter through.

"The Court:

"Could you have followed a letter through the mails from New Orleans to New York?

"A. No, sir."

(Argumentative, leading and suggestive, to such an extent that the question is in reality testimony in the form of a question.)

"The Court:

"Gentlemen: Will you come forward?"

The following is a reference to the instances where the irregularities complained of with reference to arguments held in whispers will be found in the transcript.

Record Page	Which Counsel in Conference With Judge.
56	Attorneys for defendants.
84	Does not show which attorneys in conference.
86	Judge's explanation of reason for conferences.
88	Respective Counsel.
94	Counsel for government and counsel for defendants.
102	Counsel and court.
114	Counsel and Court.
190	Counsel for both sides.
201	Mr. Rivet and Mr. Hamlin only.
209	Respective counsel.
212	Respective counsel.
214	Mr. Hamlin only.
238	Respective counsel.
243	Twice-respective counsel.
247	Respective counsel.
251	District Attorney alone.
286	Respective counsel.
326	Respective counsel.
348	Respective counsel.
381	Respective counsel.
383	Mr. Hamlin only.
407	Respective counsel.
421	Respective counsel.
422	Mr. Hamlin only.
430	Mr. Hamlin only.
439	Mr. Rivet only.
469	Respective counsel.
517	Apparently the District Attorney only.
551	Respective counsel.
601	Conference with defense counsel, at conclusion a like conference had with District Attorney.
627	Mr. Dowling only.
649	Mr. Hamlin only.

Record Page	Which Counsel in Conference With Judge.
655	Twice—1st time Mr. Hamlin and District Attorney. 2nd time Mr. Dowling only.
664	Mr. Dowling only.
701	All counsel.
742	Apparently all counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 1037

ARTHUR A. STEINER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority opinion in the circuit court of appeals (R. 1460–1466) and the special concurring opinion of Judge Hutcheson (R. 1467–1468) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 29, 1943 (R. 1468), and a petition for rehearing (R. 1469–1473) was denied April 24, 1943 (R. 1474). The petition for a writ of certiorari was filed May 20, 1943. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error in the admission and exclusion of evidence.

2. Whether the evidence sufficiently supported the allegations in counts 1 and 2 of use of the mails in furtherance of the alleged scheme to defraud.

3. Whether the trial court committed reversible error in his interrogation of witnesses.

4. Whether petitioner's constitutional rights were infringed by the trial court's practice of having counsel approach the bench for brief discussions of legal questions.

STATUTE INVOLVED

The mail fraud statute (Section 215 of the Criminal Code, 18 U. S. C. 338) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package,

writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

Petitioner and two others, James R. Stewart and Esther E. Stein, were convicted on June 19, 1942, in the District Court for the Eastern District of Louisiana on all but the third count of a six-count indictment charging them with violations of the mail fraud statute (R. 3–20, 48).[1] Petitioner was sentenced to pay a fine of $500 on each of the five counts, aggregating $2,500, and one-third of the costs of prosecution, and to serve

[1] The third count of the indictment had been dismissed upon motion of the Government (R. 698).

a period of 7 years' imprisonment under counts 1 and 2 and a consecutive 7-year period of imprisonment under counts 4, 5, and 6, execution of the latter 7-year period being suspended and the petitioner placed on probation for five years provided he comply with certain conditions (R. 53–55). On appeal by petitioner alone, his conviction was affirmed (R. 1460–1468).

Petitioner does not question the sufficiency of the evidence to establish the scheme to defraud alleged in the indictment. That scheme, which the court below described as "a fraud of the most reprehensible kind" (R. 1461), may be briefly summarized as follows: Petitioner, an attorney, would solicit tax assessment reduction business for a fee of one-half the amount he saved for the taxpayer. The solicited tax assessment reduction would be fraudulently effected by the defendant Stewart, who was the chief clerk of the New Orleans office of the Louisiana Tax Commission. The defendant Stein, a notary public, acted as a "go between" between petitioner and the defendant Stewart. The fee charged by petitioner would be divided 25 percent to petitioner, 25 percent to Stein, and 50 percent to Stewart. Execution of the fraudulent scheme on a large scale continued from 1936 to and including part of 1939 and resulted in huge profits to the defendants.

The allegations contained in counts 1 and 2 of use of the mails in furtherance of the scheme, and

the evidence adduced in support thereof, may be summarized as follows:[2]

Count 1. Count 1 alleged that on or about January 4, 1939, at New Orleans, Louisiana, the defendants mailed and caused the mailing of a statement dated December 31, 1938, on the bill head of "Steiner & Stein" to Longino & Collins, 3821 Tulane Avenue, New Orleans, Louisiana, for "services rendered personal taxes 1938, $1,129.22" (R. 10–11). This statement to Longino & Collins (R. 985), which was one of the firms for whom the defendants fraudulently secured a tax assessment reduction (R. 232), was introduced in evidence, together with the envelope to which it was attached with a pin when found in the files of Longino & Collins (R. 420–421, 985).[3] The envelope was postmarked at New Orleans on January 4, 1939 (R. 985). The billhead and envelope were exact duplicates, as to size, style of type and paper, of the billheads and envelopes which petitioner admitted to the witness Wilkinson were used by the defendants as "part of the system" and sent out by Stewart (R. 229–232, 280–285).

Count 2. Count 2 alleged that the defendants mailed and caused the mailing of a letter at New

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[2] Petitioner does not question the sufficiency of the evidence to show the mailings alleged in counts 4, 5, and 6.

[3] The United States Attorney stated in this brief filed in the court below that the envelope and statement had been pinned together for a considerable time, for the pinholes were rusty. Nothing in the record shows this, however, for the original exhibits are not before this Court.

Orleans, Louisiana, to the Intertype Corporation, 360 Furman Street, Brooklyn, New York, on February 12, 1938, in which petitioner solicited a fee from the corporation for service in connection with the reduction of the corporation's 1937 personal tax assessment and in which he enclosed a corrected bill therefor. The letter requested a check by "return mail" (R. 12–13). This letter (R. 1241) was introduced in evidence without objection by the defendants (R. 622) and two employees of the corporation testified that it had been received through the mail and was stamped with the company's incoming mail stamp, showing receipt on February 14, 1938, two days after it was written (R. 621–622, 634–635, 1241). The letter had been dictated by petitioner to his secretary in his office in New Orleans, typed, placed on petitioner's desk in his office for mailing, and signed by petitioner (R. 631–632).

Hugh M. Wilkinson, an attorney, related at the trial a complete confession petitioner made to him in February 1939 of the details of the fraudulent scheme in which the defendants were engaged (R. 189–232).[4] Before this testimony was admitted in evidence, however, petitioner objected to allowing Wilkinson to testify to any conversation between him and petitioner, on the ground that the relationship of attorney and client ex-

[4] Petitioner also revealed the general structure of the fraudulent scheme to another attorney, who testified at the trial (See R. 275–279).

isted between them and their conversations were therefore privileged (R. 117–118). The court thereupon dismissed the jury and heard evidence to determine whether the relationship of attorney and client had in fact existed (R. 118–188). At the conclusion of this evidence, the court stated that "to the Court's entire satisfaction there has been proved beyond a reasonable doubt (much more than the preponderance of the evidence) the fact that a relationship of client and attorney never did exist" (R. 185; see also, R. 187–188). The evidence upon which this finding was based may be briefly summarized as follows:

In 1939 Mr. Wilkinson was a member of the Board of Governors of the State Bar of Louisiana, elected from the first congressional district (R. 144). This board, by statute, had power, as petitioner indicates (Pet. 11, n. 10), to receive and investigate complaints as to the conduct of members of the bar and to make findings and recommendations to the legally constituted disbarment authorities.

Petitioner testified that on February 6, 1939, he went to Wilkinson's office and told Wilkinson the whole story of the fraudulent scheme in which he and the defendants Stein and Stewart were engaged and later gave Wilkinson documentary proof thereof, because he wanted Wilkinson, as an attorney, to stop Miss Stein from harassing him for her share of some of the proceeds from the scheme which he had withheld from her. Pe-

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titioner also stated that he did not go to see Wilkinson as a member of the Board of Governors of the State Bar of Louisiana, but that he said nothing to Wilkinson about a fee for representing him. (R. 121–143.)

Wilkinson's testimony was as follows: Petitioner opened up his February 6, 1939, visit by telling him he was in trouble and that the best thing for him to do was to resign as a member of the State Bar and go into the real-estate business (R. 144–145, 154). Wilkinson told petitioner very early in the conversation that he was a member of the Board of Governors of the State Bar, as petitioner well knew, and that he would have to make an investigation and report petitioner if he was engaged in any improper professional misconduct (R. 145–146). Petitioner told him the whole story, however, also implicating other attorneys who were engaged in the same practice in the Tax Commission office and on a larger scale (R. 144–145, 147, 156, 159, 165). Wilkinson sought corroboration of petitioner's statements (R. 147) and suggested to petitioner that, although he had no authority to bind either the Board of Governors of the State Bar of Louisiana or the Supreme Court or any district attorney, he would give him a personal recommendation of leniency, for whatever it would be worth, if petitioner would cooperate with him in bringing to light the true facts regarding the transactions in the Tax Commission office, both

as to petitioner's own part and that of other attorneys (R. 164–167). Petitioner aided Wilkinson in securing evidence (R. 148–153), which Wilkinson later submitted to the State Board of Governors (R. 148). Petitioner in the meantime submitted his resignation from the bar of the State Supreme Court (R. 146) and Wilkinson, a week or so later, sent out pamphlets and made a radio address, at his own expense, urging cooperation of the businessmen in connection with his investigation of the illegal transactions being conducted in the Tax Commission office (R. 159–162, 163). Nothing was ever said about Wilkinson representing petitioner as his attorney and petitioner knew that Wilkinson could not do so in view of his official position and knowledge that petitioner was engaged in professional misconduct (R. 146–147, 153). Wilkinson later informed the State Board concerning his assurance to petitioner that he would recommend leniency in his case, and Wilkinson did, in fact, tell the board that he thought petitioner was entitled to some consideration, although he had later tried to frustrate the Tax Commission investigation (R. 167).

Two of Wilkinson's associates, John D. Lambert and A. Miles Coe, who were with Wilkinson and petitioner when petitioner obtained certain evidence for Wilkinson, both testified that petitioner came to Wilkinson in his official capacity as a member of the Board of Governors

of the State Bar. Lambert also stated that petitioner sought a recommendation of leniency from Wilkinson (R. 169–185).

ARGUMENT

I

Petitioner's contentions that the district court committed a number of prejudicial errors in the admission and exclusion of evidence are lacking in merit.

A. Contradictorily, petitioner asserts that his confession to Wilkinson should have been excluded from evidence because (1) the conversations between petitioner and Wilkinson were privileged by virtue of an attorney-client relationship (Pet. 27–28) and (2) Wilkinson was a law enforcement officer who induced petitioner's confession by "promises, inducements, and hope of reward" (Pet. 11–15).

In respect of the first point, petitioner argues merely that the court below failed to apply the rule of "reasonable doubt" to the evidence adduced at the preliminary hearing conducted to determine whether the attorney-client relationship had in fact existed. But petitioner has no cause for complaint in this connection, for the district judge who heard the evidence plainly indicated that he disbelieved petitioner's testimony and twice stated that he was convinced beyond a reasonable doubt that the relationship of attorney

and client had not existed between petitioner and Wilkinson (R. 185, 187–188). The evidence adduced at the hearing, summarized *supra,* pages 8–10, patently supports the court's conclusion.

After the preliminary hearing had been held on the question of privilege and Wilkinson was recalled to the stand in the presence of the jury, petitioner objected to allowing Wilkinson to testify to "any act of guilt as against" petitioner, on the ground "that a proper foundation must be laid and it must be shown that no inducement, threat, hope or anything else was made to" petitioner "to make such admission or statement" (R. 190). Since the court had just heard evidence on the circumstances surrounding petitioner's confession of guilt to Wilkinson, another preliminary hearing on the matter was not required. Petitioner, contending that he had consulted Wilkinson as an attorney, had testified that during his first interview with Wilkinson he voluntarily disclosed the details of the fraudulent scheme in which he, Stein and Stewart were engaged and thereafter supplied Wilkinson with corroborating evidence thereof. Wilkinson was not a law enforcement officer and petitioner, an attorney, knew that all Wilkinson could do for him, as Wilkinson testified he suggested to him, was to give him his personal recommendation of leniency, which he later did. Even this suggestion of a recommendation of leniency was made after petitioner had

confessed his guilt to Wilkinson. (*Supra,* pp. 2.) The situation clearly was not such as to render petitioner's confession inadmissible in evidence against him in a federal prosecution.

B. Petitioner also contends that he was prejudiced by the district court's refusal to allow him to cross-examine Wilkinson to show his bias, interest and prejudice (Pet. 29–30). The sole instance to which petitioner refers, as appears from his brief in the court below, pages 158–160, which he has filed with this Court, is the court's refusal to allow him to question Wilkinson about a political address Wilkinson made on December 19, 1938 (R. 242–244), almost two months before petitioner allegedly consulted him as an attorney and confessed his guilt to him. The extent of cross-examination rested in the sound discretion of the district court[5] and that discretion manifestly was not abused in this instance. Moreover, the court had previously allowed cross-examination relative to this and other public addresses made by Wilkinson (See R. 234–238).

C. Petitioner's contention that he was prejudiced by proof of offenses "extra the indictment" (Pet. 28–29) requires little discussion. The alleged objectionable evidence in this respect was the proof that the defendant Stewart, rather than

[5] *Glasser* v. *United States*, 315 U. S. 60, 83; *Alford* v. *United States*, 282 U. S. 687; *United States* v. *Manton*, 107 F. (2d) 834, 845 (C. C. A. 2), certiorari denied, 309 U. S. 664.

petitioner, in two instances solicited some of the tax assessment reduction business. Petitioner asserts that this was a solicitation by Stewart on his own account, rather than as a member of the partnership with Stein and petitioner (Pet. 28). If so, petitioner was not prejudiced by the evidence, for the court's instructions to the jury required the jury to disregard evidence of separate and distinct offenses by any of the defendants which were not connected with the scheme alleged in the indictment (See R. 767).

D. The contention that copies of income-tax returns, admittedly duly authenticated pursuant to statute (28 U. S. C. 661), are inadmissible in evidence unless they are identified by a witness (Pet. 20–21) is, of course, frivolous. "The whole purpose of authentication * * * is to avoid the inconvenience and expense of calling witnesses in the ordinary way to prove that which is seldom fairly disputable. The formalities so available * * * by statute are * * * prescribed * * * as substitutes for a more tedious and undesirable method" (V Wigmore, *Evidence* (3d ed., 1940), sec. 1679, p. 763; see also, *ibid.* Vol. IV, sec. 1316, p. 630).

II

Petitioner's contentions that the mailings alleged in counts 1 and 2 occurred after the consummation of the alleged scheme to defraud (Pet. 25–26) and that the mailings were insufficiently estab-

lished by the evidence (Pet. 21–25) are also clearly lacking in merit.

A. Petitioner appears to contend that the alleged scheme to defraud was consummated each time a fraudulent tax assessment reduction was effected and that the scheme was not continuous because each count of the indictment was treated as a separate offense (Pet. 25–26). The fact that each separate use of the mails in furtherance of a scheme to defraud is a separate offense does not, of course, in any way affect the continuity of the scheme itself. The various counts of the indictment (R. 3–20) plainly charge the same, *continuing,* scheme to defraud the taxpayers of the State of Louisiana and its agencies by making illegal tax assessment reductions, and petitioner does not deny that the evidence showed that the same scheme was executed innumerable times from 1936 to 1939. As the court below stated (R. 1462), "The mailing of letters and statements to clients for the collection of fees was a necessary, indeed indispensable, element of that scheme, for without money to bribe Stewart and divide with Stein and Steiner the partnership would have failed." The mailing of the statement alleged in count 1 and of the collection letter alleged in count 2 were therefore intimately connected with the continuation of the fraudulent scheme and, hence, in furtherance thereof. Cf. *United States* v. *Kenofskey,* 243 U. S. 440, 443; *Bradford* v. *United States,* 129 F.

(2d) 274, 276 (C. C. A. 5), certiorari denied, 317 U. S. 683; *Hastings* v. *Hudspeth*, 126 F. (2d) 194, 196 (C. C. A. 10), certiorari denied, 316 U. S. 692; *Weiss* v. *United States*, 120 F. (2d) 472, 475 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Bogy* v. *United States*, 96 F. (2d) 734, 740 (C. C. A. 6), certiorari denied, 305 U. S. 608; *Brady* v. *United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621; *Tincher* v. *United States*, 11 F. (2d) 18, 21 (C. C. A. 4), certiorari denied, 271 U. S. 664; *Newingham* v. *United States*, 4 F. (2d) 490, 492 (C. C. A. 3), certiorari denied, 268 U. S. 703.

B. The proof of the uses of the mail alleged in counts 1 and 2 clearly was sufficient. The count 1 mailing, consisting of a statement for services rendered for reduction of Longino & Collins' tax assessment, was found in the files of that company, pinned to an envelope bearing a New Orleans postmark. Both the statement and envelope were identical to those which petitioner admitted were used by the defendant Stewart as part of their scheme. (*Supra*, p. 5.) This was sufficient circumstantial evidence of mailing (cf. *Gantz* v. *United States*, 127 F. (2d) 498, 502 (C. C. A. 8), certiorari denied, 317 U. S. 625; *McIntyre* v. *United States*, 49 F. (2d) 769 (C. C. A. 6)) and did not, as petitioner contends (Pet. 22), improperly establish the mailing only by a presumption upon a presumption (see *United*

States v. *Ross,* 92 U. S. 281, 283–284). The count 2 mailing was dictated by petitioner to his secretary, typed by the secretary, given to petitioner for mailing, signed by petitioner, and received in New York City by the Intertype Corporation two days later. Two employees of the corporation testified that it was received through the mails. (*Supra,* p. 6.) Since the letter was received by the company in New York City within two days after it was written in New Orleans, the evidence was clearly sufficient to warrant the inference that it was sent through the mails, regardless of whether, as petitioner contends (Pet. 24–25), the direct testimony of receipt through the mails was merely opinion evidence.

III

Petitioner complains that the trial court propounded to the witness Chadwick a series of questions which were argumentative, leading, suggestive, and improper repetition of testimony already given (Pet. 15, 31–35) and that the court "was most active in questioning witnesses throughout the trial, and with few exceptions acted on the side of the prosecution" (Pet. 16). The record reveals that petitioner's objection at the trial to the series of questions directed to the witness Chadwick was made after the court concluded his questioning of the witness and then on the ground that the questions were leading (Pet. 34; R. 600), and that petitioner raised no objection

whatever in the instances he cites (Pet. 16) for his statement that the court acted on the side of the prosecution.[7]

It is well settled, of course, that the district judges have the right to interrogate witnesses in the interest of eliciting the truth and a full disclosure of all material facts,[8] that the extent of their participation in such interrogation is a matter within their sound discretion,[9] and that it is their right and duty, if they feel the need of information, to examine in the best way calculated to produce a disclosure of all the facts.[10] A review of the instances in which the court questioned witnesses in the present case reveals that, as the court below stated (R. 1466), the district court "showed no partiality in his questioning and did not assume the role of prosecutor" and that the court's questions were at times helpful in

[7] In one instance, petitioner objected to a question on the ground it called for opinion evidence, but the question was clearly not subject to objection on that ground (See R. 556).

[8] *Glasser* v. *United States*, 315 U. S. 60, 82; *United States* v. *Gross*, 103 F. (2d) 11, 13 (C. C. A. 7); *United States* v. *Breen*, 96 F. (2d) 782, 784 (C. C. A. 2), certiorari denied, 304 U. S. 585; *Hargrove* v. *United States*, 25 F. (2d) 258, 259 (C. C. A. 8); *Kettenbach* v. *United States*, 202 Fed. 377, 385 (C. C. A. 9), certiorari denied, 229 U. S. 613; III Wigmore, *Evidence* (3d ed., 1940), sec. 748.

[9] *United States* v. *Kay*, 101 F. (2d) 270, 272 (C. C. A. 2), certiorari denied, 306 U. S. 660; *New York Transportation Co.* v. *Garside*, 157 Fed. 521, 524 (C. C. A. 2); see also *Morrissey* v. *United States*, 67 F. (2d) 267 (C. C. A. 9), certiorari denied, 293 U. S. 566.

[10] III Wigmore, *Evidence* (3d ed., 1940), sec. 784.

bringing forth answers altogether favorable to petitioner. And, even though petitioner made no objection during the trial to any of the court's questions on the ground that they were partial to the prosecution, the court carefully instructed the jury at length, on two occasions, that they were not to draw any conclusions from his attitude in questioning witnesses (See R. 753–754, 764). This clearly corrected any possible prejudice to petitioner. Cf. *Glasser* v. *United States,* 315 U. S. 60, 83.

IV

The trial court, early in the trial, told the jury that it was his practice to expedite matters of law, with which the jury was not concerned, by calling counsel to the bench rather than retiring the jury every time a question of law was discussed briefly by counsel (R. 86–87). This procedure was followed throughout the trial and petitioner at no time objected to it. He now contends that the procedure resulted in the denial of his constitutional rights to a public trial, the assistance of counsel, and to be present at every stage of the trial (Pet. 17–20). The practice of calling counsel to the bench for short discussions in *sotto voce* is a common practice which in no way detracts from the public nature of the trial or from the ability of counsel to represent the accused. The fact that petitioner could not hear the legal discussions did no violence to any of his

constitutional rights (Cf. *Johnson* v. *United States,* No. 273, decided February 13, 1943) and he manifestly was not prejudiced by a procedure to which he did not even object.

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important question of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
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